

**DECISION
of the Fifth Board of Appeal
of 19 August 2024**

In case R 2553/2023-5

Universal Brand Group Pty Limited

133 Eloff Street, Selby
2011 Johannesburg
South Africa

Applicant / Appellant

represented by Algemeen Octrooi-En Merkenbureau B.V., Vestdijk 51, 5611 CA Eindhoven,
Netherlands

v

Elon Group AB

Box 220 94
SE-702 03 Örebro
Sweden

Opponent / Defendant

represented by Advokatfirman Lindahl KB, Pråmplatsen 4, SE-211 19 Malmö, Sweden

APPEAL relating to Opposition Proceedings No B 3 180 468 (European Union trade mark
application No 18 716 750)

THE FIFTH BOARD OF APPEAL

composed of V. Melgar (Chairperson), S. Rizzo (Rapporteur) and A. Pohlmann (Member)

Registrar: H. Dijkema

gives the following

Language of proceedings: English

Decision

Summary of the facts

- 1 By an application filed on 15 June 2022, claiming priority of South African trade mark applications No 2022/10915; 2022/10916; 2022/10917 of 1 April 2022, Universal Brand Group Pty Limited ('the applicant') sought to register the figurative mark



for the following list of goods:

Class 9: Software for remote control and intelligent operation of heating apparatus for dispensing hot beverages and installations for heating beverages.

Class 11: Heating apparatus for dispensing hot beverages; Installations for heating beverages; Coffee machines, electric; Coffee capsules, empty, for electric coffee machines.

Class 30: Coffee in whole-bean form.

- 2 The application was published on 11 July 2022.
- 3 On 10 October 2022, Elon Group AB ('the opponent') filed an opposition against the registration of the published trade mark application for all the above goods.
- 4 The grounds of opposition were those laid down in Article 8(1)(b) EUTMR.
- 5 The opposition was based on the following earlier rights:
 - a) European Union word trade mark registration No 17 946 692

ELON

filed on 24 August 2018 and registered on 31 May 2019 for, inter alia, goods and services in Classes 9, 11, 21, 35, 37 and 42.

- b) Swedish word trade mark registration No 551 583

ELON

filed on 22 August 2018 and registered on 23 November 2020 for, inter alia, the following goods and services:

Class 9: Apparatuses and instruments for scientific, nautical, photographic, cinematographic and optical purposes, and apparatus and instruments for surveying, inspection, weighing, measurement, signaling, control (surveillance), lifesaving and teaching; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, recording, transmission or reproduction of sound and images; magnetic data carriers; recording discs; compact discs, dvds, and other recordable digital media; coin-operated mechanisms; cash registers; calculators; data processing equipment; computers; software; fire fighting apparatus; 3D spectacles; acoustic alarms; alarms; whistle alarms; alcoholmeters; antennas; sound transmitting apparatus; armatures [electricity]; audio- and video-receivers; time switches, automatic; distance measuring apparatus; tape recorders; personal stereos; batteries, electric; battery chargers; flashlights [photography]; diaphragms [photography]; fire alarms; fire blankets; portable media players; camcorders; compact disc players; chips [integrated circuits]; data processing apparatus; computers; computer hardware; computer programs [downloadable software]; computer software platforms, recorded or downloadable; transparencies [photography]; slide projectors; digital photo frames and signs; digital weather stations; dictating machines; diskettes; DVD players; marine depth finders; fire extinguishers and fire extinguishing apparatus; electrical adapters; alarm bells, electric; electric door bells; locks, electric; theft prevention installations, electric; igniting apparatus, electric, for igniting at a distance; electronic notice boards; light-emitting electronic pointers; screens [photography]; remote control apparatus; fluorescent screens; sleeves for laptops, smartphones and tablet computers; cases especially made for photographic apparatus and instruments; flashlights [photography]; viewfinders, photographic; photocopiers; amplifiers; hands-free kits for telephones; loudspeakers; cabinets for loudspeakers; height gauges; headphones; headphones with microphone; infrared detectors; weight measuring instruments; integrated circuit cards [smart cards]; intercommunication apparatus; joysticks for use with computers, other than for video games; juke boxes; filters [photography]; cameras [photography]; cash registers; cassette players; cinematographic apparatus; coaxial cables; encoded identification bracelets, magnetic; encoded key cards; peripherals adapted for use with computers; wearable computers and video display monitors; chargers for electronic cigarettes; lasers, not for medical purposes; audio mixers; sound recording apparatus and sound reproduction apparatus; electronic pens [visual display units]; light-emitting diodes [led]; readers [data processing equipment]; identity cards, magnetic; magnetic tapes; microphones; memory cards for video game machines; pocket calculators; monitors [computer hardware]; modems; mobile telephones; mouse pads; mouse [computer peripheral]; notebook computers; objectives [lenses] [optics]; projectors and projection screens; radios and radio transmitters; computer programs, recorded; smoke detectors; global positioning system [gps] apparatus; selfie sticks [hand-held monopods]; scanners [data processing equipment]; sirens; printers for use with computers; cordless telephones; smart glasses, smartwatches, smart rings, smart bracelets and smartphones; anti-theft warning apparatus; anti-interference devices [electricity]; subwoofers; computer keyboards; facsimile machines; telephone apparatus; telescopes; electronic publications, downloadable; peepholes [magnifying lenses] for doors; push buttons for bells; usb flash drives; shutters [photography]; walkie-talkies; video cassette players and video cassettes; video screens; video telephones; video baby monitors; bags adapted for laptops; monitors

[computer programs]; baby monitors; entertainment apparatus intended for use with a television; toys for use with television or computer; television apparatus; record players; cameras [photography]; contacts, electric and cables, electric; ammeters; connections for electric lines; armatures [electricity]; conductor (overvoltage); limiters [electricity]; lighting ballasts; cell switch (electricity); light dimmers [regulators], electric; electric loss indicators; electrified rails for mounting spot lights; accumulators, electric; electric connectors; electric apparatus for commutation; electric loss indicators; cables, electric; contacts, electric; couplings, electric; conductors, electric; electricity conduits; metallic wires [electric]; resistances, electric; measuring devices, electric; converters, electric; light dimmers [regulators], electric; relays, electric; coils, electric; switches, electric; regulating apparatus, electric; igniting apparatus, electric, for igniting at a distance; discharge tubes, electric, other than for lighting; fibre optic cables; remote switch (electric); junction boxes [electricity]; distribution boxes [electricity]; distribution boards [electricity]; junction boxes [electricity]; semi-conductors; sheaths for electric cables; holders for electric coils; inductors [electricity]; control panels [electricity]; step-up transformers; copper wire, insulated; coaxial cables; junction sleeves for electric cables; collectors, electric; commutators; distribution consoles [electricity]; switchboxes [electricity]; connectors [electricity]; electricity conduits; light-conducting wires (optical fibers); ducts [electricity]; materials for electricity mains [wires, cables]; identification sheaths for electric wires; identification threads for electric wires; terminals [electricity]; tubes (electrical discharge), not for lighting; voltage surge protectors; covers for electric outlets; cell switches [electricity]; plugs, sockets and other contacts [electric connections]; anti- interference devices [electricity]; transformers [electricity]; wire connectors [electricity]; socket (power -) [electricity]; inverters [electricity]; voltage surge suppressors; voltage surge protectors; lightning conductors; sim cards; parts, components and accessories for the aforementioned goods.

Class 11: Apparatus for lighting, heating, steam generating, cooking, refrigerating, drying and ventilating; heating filaments; household and kitchen electrical appliances; cooking stoves; microwave ovens [cooking apparatus]; gas ovens; electric ovens; hot plates; barbecue apparatus; electric coffee brewers; coffee machines, electric; espresso coffee machines; heating apparatus and instruments; disinfectant apparatus; hot water reservoirs; waterheaters; electric torches; air-conditioning installations and appliances; heat pumps; parts, components and accessories for the aforementioned goods.

Class 21: Utensils and containers for household purposes and kitchen utensils.

Class 35: Advertising; retail services in relation to consumer electronics, goods for safety and surveillance, small electrical goods for consumers, hand tools and hand instruments, electrical hand instruments, couplings, electric and electricity conduits, electric lamps, white goods, lighting apparatus, apparatus for heating, steam generating apparatus, cooking apparatus, refrigerating apparatus, apparatus for drying, apparatus for ventilating, apparatus for water supply and sanitary purposes, clocks (watches), stationery, building materials, furniture, utensils and containers for household purposes as well as kitchen utensils and consumer electronics.

Class 37: *Repair / maintenance of kitchen fittings; laundry fittings; bathroom fittings and furniture; installation services for kitchens, laundries and bathrooms; installation of kitchen fittings; installation of home furnishings; services for the fitting of kitchens; fitting of doors of kitchen countertops, sinks, shelves and cabinets; installation, maintenance and repair of electrical equipment and electrical installations; installation, maintenance and repair services for electricity; installation, maintenance or repair of electrical wiring and sockets; installation, maintenance and repair of electrical equipment, electrical apparatus, electrical devices, electrical wiring, electrical systems and electric lights; installation, maintenance and repair of electrical wiring; advisory services and provision of information regarding the installation, maintenance and repair of electrical equipment; alarm, lock and safe installation, maintenance and repair; installation, maintenance and repair of security systems and video surveillance; information on installation of safety systems, bathrooms and kitchen fittings, kitchen and bathroom, electrical equipment as well as electrical wiring and electrical systems.*

Class 42: *Design services; design and planning of kitchens and kitchen furnishings; designing of electronic systems; database consultancy services; rental of access to computer programs; updating computer software; software design; interior design (design, planning); furnishing design services.*

- 6 By decision of 14 November 2023 ('the contested decision'), the Opposition Division partially upheld the opposition, for all the contested goods in Classes 9 and 11, on the grounds that there was a likelihood of confusion for said goods. It gave, in particular, the following grounds for its decision:

Preliminary remark

- Cancellation proceedings No 53 685 are pending against the opponent's European Union trade mark registration No 17 946 692 'ELON' (word mark) on which the opposition is also based. However, the sole purpose of the oppositions is to decide whether the contested application may proceed to registration (11/05/2006, T-194/05, Teletch International, § 25-27). In the present case, the outcome of the opposition would, for the reasons set out below, not be different, even if that earlier mark of the opponent was ultimately declared invalid, and a suspension of the present proceedings is, therefore neither necessary nor appropriate. The Office will rather proceed to examine the present opposition on the basis of the opponent's Swedish trade mark registration No 551 583 'ELON' (word mark) on which the opposition is also based, despite European Union trade mark registration No 17 946 692 'ELON' (word mark) being at risk.

Likelihood of confusion

- The contested *software for remote control and intelligent operation of heating apparatus for dispensing hot beverages and installations for heating beverages* in Class 9 is identical to the opponent's *software* because the contested goods are included in the broad category of the opponent's goods.
- The contested *heating apparatus for dispensing hot beverages; installations for heating beverages; coffee machines, electric* in Class 11 are identical to the

opponent's *apparatus for heating* because they are included in or overlap with the broad category of the opponent's goods.

- The contested *coffee capsules, empty, for electric coffee machines* in Class 11 are similar to the opponent's *apparatus for cooking* as they usually coincide in producer, relevant public and distribution channels.
- The remaining contested *coffee in whole-bean form* in Class 30 and the goods and services in Classes 9, 11, 21, 35, 37 and 42 of the opponent's Swedish trade mark registration No 551 583 do not have the same natures, purposes or methods of use and they do not target the same relevant public or share the same distribution channels. Furthermore, the goods/services under comparison are not complementary to each other or in competition and they are not usually produced or provided by the same undertakings. In this respect, it is particularly considered that the differences in nature between those goods and services outweigh any existing link of complementarity between them, also bearing in mind that these goods and services at issue are usually not available from the same sections in shops. Even though coffee machine manufacturers may sell coffee under the same trade mark, this is not the rule and would in any event only apply to coffee machine manufacturers which are particularly successful. Complementarity is not usually conclusive on its own for finding similarity between goods and/or services. Even where a degree of complementarity exists, goods and/or services may be dissimilar. Therefore, they are dissimilar.
- The goods found to be identical or similar target the public at large whose degree of attention may vary from average to high, depending on the specialised nature of the goods, the frequency of purchase and their price.
- The relevant territory is Sweden.
- The opponent argues that the signs' verbal elements ELON and ELTON will be perceived as first names and particularly be associated with two different famous persons, namely Elon Musk and Elton John. However, there is no evidence on file that the entirety of the relevant public in Sweden will indeed associate the signs with those two personalities. Moreover, it is not necessary to establish a likelihood of confusion for the whole of the relevant public under examination (20/07/2017, T-521/15, Diesel v EUIPO, § 69). In the present case, the Opposition Division, therefore, finds it appropriate to focus the comparison of the signs on the part of the public that will perceive the signs as personal names only (without associating them with any particular personalities), as a likelihood of confusion for only part of the relevant public is sufficient to reject the contested application. It is further noted that the terms ELON and ELTON do not have a clear and specific meaning in respect of the goods found to be identical or similar and they are, therefore, normally distinctive. The impact on the comparison of the stylisation of the contested sign's verbal element is limited as it is a very simple graphical configuration of the letters ELTON.
- Since the opponent did not explicitly claim that its earlier mark is particularly distinctive by virtue of intensive use or reputation, for the reasons explained above, the distinctiveness of the earlier mark must also be seen as normal.

- Visually and aurally, the signs coincide in the letters ‘EL(*)ON’ and its sounds and only differ in the third letter ‘T’ and its sound of the contested sign that has no counterpart in the earlier mark. However, both signs consist of a single word with a similar number of letters and all four letters of the earlier mark are identically contained in the contested sign in the same order. Therefore, the signs have the same structure and both will be pronounced in two syllables, and the sole differing letter ‘T’ is placed in the middle of the contested sign, which results in the signs having an identical beginning and ending. Moreover, when pronounced, the differing sound may easily get absorbed by the sound of the accompanying letters, and the impact of the figurative aspect of the contested sign is limited as it merely consists in the stylisation of its letters. Overall, it is, therefore, concluded that the signs are visually and aurally highly similar.
- Conceptually, reference is made to the previous assertions concerning the semantic content conveyed by the marks. As the signs will be associated with different personal names and, therefore, a dissimilar meaning, the signs are conceptually not similar. Having regard to most recent case-law, it is also true, however, that the comparison between the signs is not decisively influenced by the fact that they refer to different forenames, and the slight stylisation of the contested mark cannot have a significant impact on the conceptual comparison between the signs neither (19/09/2023, R 252/2023-5, ELTON (fig.) / ELON).
- The goods have been found partly identical or similar and partly dissimilar. The goods found to be identical or similar are directed at the public at large whose degree of attention may vary from average to high. The earlier mark has a normal distinctiveness and the signs have been found visually and aurally highly similar and conceptually not similar. The Opposition Division takes note of the fact that – where at least one of the signs at issue has a clear and specific meaning that can be grasped immediately – the resulting conceptual difference may offset the visual and aural similarity when making the overall assessment of similarity of the signs ((12/01/2006, C-361/04, Picaro, § 20; 05/10/2017, C-437/16 P, CHEMPIOIL / CHAMPION et al., § 44; 04/03/2020, C-328/18 P, BLACK LABEL BY EQUIVALENZA (fig.) / LABELL (fig.) et al., § 75). It is also true, however, that any existing conceptual differences may escape the attention of the public where the visual and aural similarities are strong. Moreover, account must also be taken of the fact that the comparison between the signs is usually not decisively influenced by the fact that they refer to different forenames (19/09/2023, R 252/2023-5, ELTON (fig.) / ELON).
- The degree of visual and aural similarity of the signs is high due to the coincidence in the letters ‘EL(*)ON’, as established above, and the different concepts of the signs are, therefore, not strong enough and – contrary to the applicant’s arguments – incapable of offsetting the high degree of visual and aural similarity. Taking into account the principles of interdependence and imperfect recollection, as well as the high degree of visual and aural similarity of the signs, the Opposition Division particularly considers that the differences of the signs do not allow the public under analysis to safely distinguish between the marks for goods that have been found identical or similar. To the contrary, it is rather highly conceivable that the public, even when displaying a higher degree of attention, is

likely to confuse the signs and believe that the goods come from the same or economically linked undertakings.

- There is a likelihood of confusion at least on the part of the public that will perceive the signs as personal names (without associating them with any particular personalities). This is sufficient to reject the contested application. It follows from the above that the contested trade mark must be rejected for the goods found to be identical or similar to those of the earlier Swedish trade mark registration No 551 583. The rest of the contested goods are dissimilar.
- 7 On 21 December 2023, the applicant filed an appeal against the contested decision, requesting that the decision be entirely set aside. The statement of grounds of the appeal was received on 14 March 2024.
- 8 In its response received on 5 July 2024, the opponent requested that the appeal be dismissed.

Submissions and arguments of the parties

- 9 The arguments raised in the statement of grounds may be summarised as follows:
- The Opposition Division appears to have missed and/or neglected pertinent arguments, particularly concerning the comparison of signs, especially in the aspects of auditory and conceptual elements.
 - The relevant territory is the European Union.
 - The earlier trade mark is a word mark, while the contested trade mark application is a (word and) device mark. The word ELON has no meaning in the English language, however it is a highly well-known personal first name, mainly used for men. For the word ELTON can be said the same, it has no meaning in the English language, but also refers to a highly well-known personal first name, both a surname and a male given name.
 - The shorter a sign, the more easily the public is able to perceive all of its single elements. In the present case, both signs are rather short. As a result of this, because the average consumer normally perceives both signs as a whole, the average consumer will quickly and immediately be able to note the relevant differences between the signs.
 - The contested sign has a distinctive stylisation, as a specific font has been used and all individual letters are shown in an extreme or extra bold manner, while the earlier sign is merely a word mark. So, the stylisation of the contested sign is distinctive and dominant for that reason alone.
 - Furthermore, a major difference occurs in the first syllable of both signs (‘E-’ versus ‘EL-’). The first part of a trade mark is generally the one that primarily catches the consumer’s attention and, therefore, will be remembered quicker/easier and stronger than the other second part/syllable of the sign. This means that in general, the beginning of a sign has a significant influence on the

general impression made by the mark (15/12/2009, T-412/08, Trubion, EU:T:2009:507, § 40; 25/03/2009, T-109/07, Spa Therapy, EU:T:2009:81, § 30).

- There is no visual similarity between both signs.
- Aurally the earlier trade mark consists of two syllables, namely ‘E-’ and ‘-LON’. On the other hand, the contested sign consists of two syllables ‘EL-’ and ‘-TON’. The third letter ‘T’ of the contested sign has no counterpart in the earlier mark. The pronunciation of both marks is therefore very different. The earlier mark starts with a long vowel E sound, like in the word ‘bee’. While the contested trade mark starts with a short vowel E sound, like in the word ‘egg’. This creates a significant difference in the aural comparison of both signs.
- The contested decision is too superficial in the phonetic comparison. Some important arguments, like the pronunciation of the first letter E of both signs being different, is, with due respect to the Opposition Division, incorrectly completely overlooked and/or ignored. The phonetic difference is by far more important than the superficial approach that both signs only differ in the third letter and that both signs have two syllables.
- In addition, the applicant submits new evidence to reinforce its earlier mentioned argument. This evidence was not available at the time of the decision of the Opposition Division. The applicant involved RWS, a global and prominent leader in translation services, language services and intellectual property support solutions, to conduct a linguistic study on the pronunciation of both personal first names. See for more information the website: <https://www.rws.com/>.
- In this study, one (1) language specialist per language was asked to provide:
 - the sequence of phonemes for the words ‘Elon’ and ‘Elton’ using the International Phonetic Alphabet;
 - a recording of the pronunciation of each term;
 - an explanation of a potential concern with the actual use of any part of the words (i.e. bad connotation in their language or if these are just difficult to pronounce). Nothing was reported by RWS.
- In the table below, it is possible to see the outcome/results of the linguistic study executed by RWS. The applicant also attached the original document with the recordings of the pronunciation of ELON and ELTON in several important EU languages (Annex 1)

Language	Pronunciation "Elon"	Recording "Elon"	Pronunciation "Elton"	Recording "Elton"
Danish (Denmark)	'ilɔn		'elɔn	
German (Germany)	'i:lɔn		'eltn	
English (GB)	'i:lɔn 'elɔn		'elɔn	
Spanish (Spain)	'elɔn		'elɔn	
Finnish (Finland)	'elɔn		'elɔn	
French (France)	'elɔn		'elɔn	
Italian (Italy)	'i:lɔn		'elɔn	
Dutch (Netherlands)	'ilɔn		'elɔn	
Swedish (Sweden)	'ilɔn		'elɔn	

- It is noteworthy that in many languages of the EU, the letter ‘e’ in ELON is pronounced as the letter ‘i’, including in Swedish. Whereas the letter ‘e’ in ELTON is always pronounced as a short vowel ‘e’ sound, like in the word ‘egg’. If and to the extent necessary, next, the pronunciation of ‘-LON’ and ‘-TON’ also differs in several EU languages, unlike its visual similarity. In view of the above and the added recordings, the statement of the Opposition Division that, when pronounced, the differing sound may easily get absorbed by the sound of its accompanying letter, is incorrect.
- On top of the above, it is important to note that the difference already occurs in the first part of both signs. This is not only relevant to show the absence of the visual similarity between both signs but also to show the absence of the aural similarity between both signs. This is because the first part of a trade mark is generally the one that primarily catches the consumer’s attention and, therefore, will be remembered more quicker/easier and stronger than the other second syllable of the sign.
- Therefore, the difference in emphasis in relation to the pronunciation of (i) the letter ‘E’ as well as the letter ‘T’ in the contested sign, (ii) the difference in pronunciation between the first syllable ‘EL-’ versus the first syllable ‘E-’, as well as (iii) the different pronunciation of ‘-TON’ and ‘-LON’ in several EU languages create a significant aural difference. Conclusion: there is in no way whatsoever a high degree of aural similarity as incorrectly stated by the Opposition Division.
- The Opposition Decision correctly stated that both signs have a dissimilar meaning, as the signs will be directly associated with different personal names, and that, in view of this, the signs are conceptually not similar.
- When the public is confronted with the name ELON, the first association that will immediately come to mind is Elon Musk, who is considered to be one of the most famous persons in the world at this moment and also at the moment of the EUTM application. Please also see https://en.wikipedia.org/wiki/Elon_Musk and <https://www.forbes.com/profile/elon-musk/> as examples for further information. Many more links and articles are available as this is one of the wealthiest and most talked about person in the world.

- Confronted with the name ELTON, the average public will have the immediate association with the world-famous artist Elton John, who also does not need any introduction either. Please also see https://en.wikipedia.org/wiki/Elton_John for further information. As well as <https://www.statista.com/statistics/271174/top-selling-artists-in-the-united-states/> for an indication of top-selling artists worldwide, which lists Elton John in eight place. Again, we attach a print screen of part of the page as an introduction.
- In this case, both signs are (whether consciously chosen or not; this is irrelevant) the first names of world-famous and therefore very well-known persons. Therefore, the vast majority of the public will immediately and easily be able to make a clear distinction between these world-famous first names Elon and Elton. To illustrate this, if someone would say Elton Musk or Elon John, this will immediately sound wrong to everyone listening. The public can easily differentiate between both signs. In no way whatsoever, the contested sign will probably be considered as a variant of the association allegedly made by the average consumer that the earlier trade mark is just a forename, as incorrectly stated by the opponent.
- There is neither a likelihood of confusion regarding the very small part of the public that does not make the immediate and obvious connection to the two world-famous persons.
- If and to the extent necessary, in view of the fact that at least two of the three relevant aspects (aural and conceptual) are clearly different between the two signs, any possible visual similarity between the two signs is overruled or majorly offset by these two aspects, as a result of which the likelihood of confusion does neither exist regarding this (very) small part of the public. The contested decision failed to adequately process the well-founded arguments of the applicant before the Opposition Division and regarding certain arguments failed to deal at all with a number of applicant's main arguments. It seems that the Opposition Division considered itself forced to merely repeat its very recently expressed view on both signs in another case between the opponent and another company than the opponent.
- The decision of the Opposition Division incorrectly overlooks and/or ignores all case-law mentioned in the earlier arguments submitted by the applicant during the opposition. The Opposition Division briefly references only once to case (19/09/2023, R 252/2023-5, ELTON (fig.) / ELON), which concerns – as explained above – its own very recent decision regarding Elton and Elon in another case between the opponent and another company than the applicant, and which case had a completely other context. In doing so, the Opposition Division swiftly bypasses other relevant jurisprudence that should have led to a different decision.
- Conceptually, the signs do not coincide, both signs will be perceived as different personal names by a significant part of the relevant public. The sign ELON will evoke a direct association with worldwide famous Elon Musk by the public, which already constitutes a clear conceptual difference between the marks. While the sign ELTON will be directly associated with the also world-famous British

pop singer Elton John, who is one of the bestselling artists of all time. Information about both world-famous persons has already been mentioned earlier. As the signs will clearly be associated with different personal first names and, therefore, a dissimilar meaning, the signs are conceptually not similar.

- Furthermore, the impact of the rock-solid observation that both signs are by far conceptually not the same is much greater/larger than merely ‘not more than just a supporting argument’ for the overall assessment of both signs. This has also been incorrectly stated or indicated by the Opposition Division in the present case.
- The above principles have been confirmed in, amongst other case-law, in a decision where the Opposition Division came to the conclusion that there was a strong conceptual difference between the marks HILTON and ELTON. Despite the goods in that case being identical, the phonetic and visual differences, but above all, the strong conceptual difference between the marks, played an important role in the latter decision that the marks are dissimilar and have therefore no likelihood of confusion. Although HILTON is a trade mark, it is primarily a surname, whereas Elton is a man’s first name. (30/07/1999, opposition B 13 179, HILTON v. ELTON, p. 4)
- Also in the decision of the Opposition Division on 09/09/2022 in Opposition B 3 100 127, ARANDA / AMANDA, the same conceptual difference is confirmed. The name Aranda is a well-known Spanish female name and considered to be conceptually different to the female first name Amanda. Conceptually, reference is made to the previous observations concerning the semantic content conveyed by the marks. As the signs convey different concepts, namely a personal female first name in the case of the contested sign (Amanda) and a location in Spain or a surname in the case of the earlier mark (Aranda), the signs are conceptually different.
- In addition to the above, the applicant highlights the more recent decision of the Opposition Division in Opposition B 3 174 207, EDISON / EDONIS, dated 16 November 2023 which supports the argument of the applicant that the public will easily distinguish the clear and specific concepts of the (sur)names ELTON and ELON.
- There is no degree of conceptual similarity at all (i.e. a strong dissimilarity) and this already sufficient to dismiss the claim of the opponent that there is likelihood of confusion.
- There is only a limited similarity between the goods and services, and, unlike the opponent, the applicant will be active in the high-end consumer market. Next, just like in case the Boards of Appeal would consider that there is a great level of similarity, this is overruled or offset by the other abovementioned arguments of the applicant, as a result of which the same conclusion can be drawn: there is no likelihood of confusion between the two signs as a result of which the average consumer would consider the companies of the opponent and of the applicant as belonging to the same international group of companies. Such incorrect reasoning

is much too far stretched and is not conclusively supported by higher case-law at all.

- The opponent still needs to prove that the overall impression at the average consumer caused by the contested sign is likely to lead the relevant part of the public to believe that e.g. the abovementioned high-end and expensive coffee machine of the applicant derives from a company (i.e. the applicant) which is linked economically to the opponent. There is no such likeliness of confusion that the average consumer (legal fiction) will consider the respective separate companies of the opponent and of the applicant as economically linked.
- The conceptual differences between signs may counteract their visual and aural similarities, should these visual and/or aural similarities exist (which the applicant contests), provided that at least one of the signs has a clear and specific meaning for the relevant public, with the result that that public is capable of grasping it immediately (12/01/2006, C-361/04 P, PICARO, PICASSO EU:C:2006:25, § 20; 23/03/2006, C-206/04 P, SIR (fig.) / ZIRH, EU:C:2006:194, § 35; 14/10/2003, T-292/01, BASS / PASH, EU:T:2003:264, § 54).
- This is the principle of ‘neutralisation’, the impact of which is taken into consideration when making the overall assessment of similarity between the signs (05/10/2017, C-437/16 P, CHEMPIOIL / CHAMPION et al., EU:C:2017:737, § 44; 04/03/2020, C-328/18 P, BLACK LABEL BY EQUIVALENZA (fig.) / LABELL (fig.) et al., EU:C:2020:156, § 75). For there to be such a counteraction, it is sufficient if at least one of the marks at issue has, from the point of view of the relevant public, a clear and specific meaning so that the public is capable of grasping it immediately (14/10/2003, T-292/01, BASS / PASH, EU:T:2003:264, § 54; 05/10/2017, C-437/16 P, CHEMPIOIL / CHAMPION et al., EU:C:2017:737, § 47).
- The neutralisation doctrine applies on both marks, the conceptual difference in this case does neutralise any possible visual and phonetic similarities. This doctrine is confirmed in the abovementioned decision of the EUIPO Opposition Division, where it was concluded there was a strong conceptual difference between the marks HILTON (a surname) and ELTON (a man’s first name) (30/07/1999, opposition B 13 179, HILTON v. ELTON, p. 4). Also, in the Opposition decision of the Office on 09/09/2022 in opposition B 3 100 127, ARANDA / AMANDA, the same conceptual difference is confirmed.
- See also judgment of 26/04/2018, T-554/14, MESSI (fig.) / MASSI et al., EU:T:2018:230, § 73 and opposition B 3 174 207, EDISON / EDONIS, p. 4, 5, 6 and 7.
- It is established that the conceptual differences between both signs are evident. Many other decisions confirm this point of view. Also, the phonetic differences are clear and obvious in many of the languages of the EU, also in Swedish. Also based on the neutralisation doctrine, an obvious conceptual (strong) difference can overcome phonetic and visual similarity. In the present case at hand, the applicant also established obvious phonetic and visual differences, and the limited

similarity regarding the goods and services of both signs does not result in a different conclusion.

- There is no relevant similarity between both signs and no likelihood of confusion between the signs.

10 The arguments raised in response may be summarised as follows:

- In its appeal, the applicant has filed new evidence in support of its claim. Annex 1 consists of a supposed linguistic report executed by a company named RWS. According to the applicant, the linguistic report was not available at the time of the proceedings before the EUIPO. Even if this was the case, if the applicant wanted to include such a study to support its arguments, it should have had the study carried out already during the first instance proceedings before the EUIPO. Consequently, there is no valid reason for why the evidence has been submitted for the first time in the appeal proceedings. Likewise, there is no valid reason for why the applicant has submitted Annexes 2-5 to its statement of grounds for the first time before the BoA. These annexes consist of print screens from Wikipedia, Forbes and Statista with information about Elon Musk and Elton John.
- The Board of Appeal should disregard all the evidence adducted by the applicant on the 14th of May 2024 (and submitted again on the 26th of April 2024) in accordance with Article 54 of the Rules of Procedure of the Boards of Appeal. The evidence was not submitted before the EUIPO, and it has therefore not been submitted in due time. Furthermore, none of the evidence is likely to be relevant for the outcome of the case in the appeal proceedings, and even if the evidence would be taken into account, it does not support the claim that there is no likelihood of confusion between the earlier marks and the contested mark.
- The Opposition Division has correctly concluded that the goods covered by the contested mark in Classes 9 and 11, against which the appeal is directed, are identical to the goods covered by the earlier marks. During the proceedings, the applicant acknowledged this similarity between the goods and services, but is of the opinion that the similarity should be overruled by the alleged dissimilarity between the marks.
- The relevant trade marks are visually similar to a high degree. As the Opposition Division has correctly concluded, both trade marks consist of a single word with similar number of letters. All four letters of the earlier marks are also identically contained in the contested mark. Consequently, the trade marks have the same structure and an identical beginning and ending, resulting in both visual and aural similarity.
- The Opposition Division is correct in stating that that the stylisation of the contested mark's verbal element is limited as the graphic configuration of the letters are extremely simple. The applicant tries to argue that the stylisation of the contested mark is distinctive and dominant. However, as the contested mark merely consists of letters in bold forming the word ELTON in upper case letters, this argument should be left without regard.

- Furthermore, the opponent agrees with the applicant when it comes to the fact that the beginning of a sign generally is the one that catches the consumer’s attention. However, the parties appear to make different interpretations of the relevant case-law. In the present case, both the beginning and the ending are identical. Therefore, it is difficult to understand the applicant’s statement that the initial parts of the compared trade marks differ from one another. Rather, it is obvious that the marks share the initial letters ‘EL-’, which will be especially noted by the consumer.
- To summarise, no other conclusion can be reached other than that the Opposition Division has made a completely correct assessment when stating that the compared trade marks are visually similar to a high degree.
- The trade marks are also highly similar from an aural point of view. This has also been confirmed in the Opposition Division’s Decision.
- The only difference between ELTON and ELON is the third letter ‘T’. As noted by the Opposition Division, the differing sound of this letter may easily get absorbed due to the position of the letter in the contested mark. Additionally, both trade marks consist of two syllables, which increases the phonetic similarity between the marks. When it comes to the aural comparison, the opponent especially disagrees with the applicant’s argument about the different pronunciation of the initial letter ‘E’ in the respective marks.
- Furthermore, the applicant has filed completely new evidence before the BoA in support of its claim that there is no likelihood of confusion between the trade marks. This evidence refers, inter alia, to the aural comparison. Annex 1 consists of a supposed linguistic report executed by a company named RWS. The opponent has not been provided the recordings of the supposed different pronunciations of the trade marks that was supposed to be included in the evidence and is therefore not able to make any comments in this regard.
- The credibility of evidence is the key element in assessing probative value, and the supposed linguistic report as presented is neither relevant, reliable nor representative. This supposed ‘study’, as presented, is questionable at best. It does not contain any indication whatsoever as to the methodology used, the origin of the study or their qualifications to be deemed a linguistic expert in not one but nine languages. The qualifications can be called into question in light of the completely incorrect suggestion that the letter ‘E’ in ‘ELON’ is pronounced as an ‘I’ in Swedish (a language which the opponent is intimately familiar with). The opponent was very surprised by this conclusion and given that this part of the study is evidently false, the reliability of the rest of the study can be strongly questioned as well.
- To summarise, no other conclusion can be reached than that the Opposition Division has made a completely correct assessment when stating that the compared trade marks are aurally similar to a high degree. The submitted linguistic report should be disregarded by the BoA given its dubious methodology, veracity or origins, and even if the evidence were to be considered, this could not lead to a conclusion that the trade marks are aurally dissimilar.

- In its appeal, the applicant focuses a lot on the conceptual comparison between ELON and ELTON even if the Opposition Division in fact concluded that the trade marks are conceptual dissimilar. The new evidence related to the alleged conceptual dissimilarities (Annexes 2-5) cannot under any circumstances lead to the conclusion that the high degree of visual and aural similarity between ELON and ELTON should be overlooked. Consequently, the visual and aural similarities between the trade marks are clearly sufficient to establish a risk for a likelihood of confusion, even if it should be accepted that there is no conceptual similarity.
- The opponent does not agree with the Opposition Division on the alleged conceptual dissimilarities between the trade marks. Instead, it maintains its position that neither ELON nor ELTON have a semantic meaning. If neither of the compared trade marks refer to any concept, as in the present case, a conceptual comparison is not possible and should not influence the assessment of the similarity between the signs. Nevertheless, if a conceptual comparison is to be conducted, this should focus on the part of the public that will perceive the trade marks as personal names only (without associating them with any particular personalities), in line with the conclusions in the Opposition Division's decision.
- Moreover, the opponent's use of the company name and trade mark ELON started many years before Elon Musk was a famous name (at least in Sweden), and the trade mark was created without any inspiration from Elon Musk whatsoever.
- Furthermore, there is no concrete evidence on file that the relevant public will associate ELON with Elon Musk and ELTON with Elton John. The newly submitted evidence, Annexes 2-5, consist of simple and irrelevant print screens from Wikipedia, Forbes and Statista with information about the two personalities. This does not prove that the relevant public in this particular case will make an association between ELON / ELTON and Elon Musk / Elton John. Drawing a parallel between the public's knowledge of the famous inventor Thomas Edison on the one hand, and the relevant public's ability to associate certain trade marks to Elon Musk / Elton John on the other hand, as the applicant does, is too far-reaching. The decisions mentioned by the applicant should therefore not be considered by the BoA.
- The Opposition Division has correctly concluded that the relevant public for assessing the likelihood of confusion between the relevant trade marks is the public at large in Sweden. In relation to the earlier EU trade mark registration, the relevant public is the public at large in the EU.
- The attention of the relevant public will vary from low to average (and not average to high). This is the case as the goods in question are not luxury goods, particularly expensive or potentially dangerous. Taking these factors into account, the general public should be more prone to confusion in the present matter, with an attention ranging from low to average. However, as was correctly concluded by the Opposition Division, even consumers who pay a high degree of attention need to rely on their imperfect relocation of a trade mark.

- There does indeed exist a likelihood of confusion between the trade marks ELTON and ELON.
- The compared trade marks are similar to a very high degree. This is the case since the confronted signs differ in a sole letter only. The high degree of similarity between these specific marks, ELON and ELTON, has also been confirmed by the EUIPO in previous cases. Furthermore, the marks cover identical, or at least highly similar, goods. As a result, it is likely that the relevant consumer, who only display a low to average degree of attention, will associate the compared trade marks with one another. The potential conceptual differences between the marks does not neutralise the visual and aural similarities. Neutralisation can only be applied exceptionally, and the visual and aural similarities in this case are so high that a potential conceptual difference is incapable of offsetting the similarities between the marks.

Reasons

- 11 All references made in this decision should be seen as references to the EUTMR (EU) No 2017/1001 (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended, unless specifically stated otherwise in this decision.
- 12 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

Scope of the appeal

- 13 The applicant, in its notice of appeal, appealed the contested decision in its entirety.
- 14 The Board notes that, pursuant to Article 67 EUTMR, an appeal is open to any party adversely affected by a decision. The applicant is not adversely affected to the extent that the contested decision rejected the opposition and allowed the contested EUTM application to proceed.
- 15 In the absence of a separate appeal or cross appeal filed by the opponent against the partial rejection of the opposition, the contested decision has become final insofar as the EUTM application was allowed to proceed for *coffee in whole-bean form* in Class 30.
- 16 In light of the above, this appeal relates to whether or not the Opposition Division correctly upheld the opposition for the following goods:

Class 9: Software for remote control and intelligent operation of heating apparatus for dispensing hot beverages and installations for heating beverages.

Class 11: Heating apparatus for dispensing hot beverages; Installations for heating beverages; Coffee machines, electric; Coffee capsules, empty, for electric coffee machines.

Admissibility of the evidence submitted for the first time before the Board

- 17 Together with the statement of grounds of the appeal, the applicant submitted the following documents:
- Annex 1: linguistic report RWS (PPT including sound files);
 - Annex 2: printout from https://en.wikipedia.org/wiki/Elon_Musk;
 - Annex 3: printout from <https://www.forbes.com/profile/elon-musk/>;
 - Annex 4: printout from https://en.wikipedia.org/wiki/Elton_John;
 - Annex 5: printout from <https://www.statista.com/statistics/271174/top-selling-artists-in-the-united-states/>.
- 18 As the Court has held, it results from the wording of Article 95(2) EUTMR that, as a general rule and unless otherwise specified, the submission of facts and evidence by the parties remains possible after the expiry of the time limits to which such submission is subject under the provisions of the EUTMR. Moreover, the Office is in no way prohibited from taking account of any facts and evidence submitted or produced late; that is to say, after the time limit provided by the Regulation and, as the case may be, for the first time before the Board of Appeal (13/03/2007, C-29/05 P, Arcol, EU:C:2007:162, § 42; 18/07/2013, C-621/11 P, Fishbone, EU:C:2013:484, § 22).
- 19 In stating that the latter ‘may’, in such a case, decide to disregard evidence, Article 95(2) EUTMR grants the Office broad discretion to decide, while giving reasons for its decision in that regard, whether or not to take such evidence into account (13/03/2007, C-29/05 P, Arcol, EU:C:2007:162, § 43; 18/07/2013, C-621/11 P, Fishbone, EU:C:2013:484, § 23).
- 20 According to Article 27(4) EUTMDR, the Board may accept facts or evidence submitted for the first time before it only where those facts and evidence meet two requirements. Firstly, it must be established that they are *prima facie* relevant for the outcome of the case. Secondly, it must be established that these facts and arguments have not been produced in due time for valid reasons, in particular, where they are merely supplementing relevant facts and evidence that had already been submitted in due time or are filed to contest the findings made or examined by the first instance of its own motion in the decision subject to appeal.
- 21 It follows that although Article 95(2) EUTMR and Article 27(4) EUTMDR grant the Board broad discretion to decide, while giving reasons for its decision, whether to take evidence submitted for the first time before it into account, there are clear limits to this discretion, which will be duly taken into account in the examination below.
- 22 The Board notes that the evidence submitted at the appeal stage is *prima facie* relevant to the outcome of the present case. Furthermore, the documents submitted by the applicant clearly aim to contest the Opposition Division’s findings regarding the aural and conceptual similarity of the signs. Finally, there is nothing to suggest negligence or delaying tactics (18/07/2013, C-621/11 P, Fishbone, EU:C:2013:484, § 36).
- 23 Taking into account all the facts surrounding the late submission of the evidence, the Board deems it equitable to exercise its discretion pursuant to Article 95(2) EUTMR and Article 27(4) EUTMDR and concludes that the additional evidence submitted by the applicant for the first time at the appeal stage is admissible.

- 24 Nevertheless, the Board stresses that the *prima facie* relevance of the evidence submitted for the first time before the Board does not imply that it is conclusive for the outcome of the present case.

Article 8(1)(b) EUTMR

- 25 Article 8(1)(b) EUTMR states, in material part, that the trade mark applied for must not be registered if, because of its identity with, or similarity to, the earlier trade mark and the identity or similarity between the goods or services covered by the trade marks, there is a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark.
- 26 The risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically linked undertakings, constitutes a likelihood of confusion within the meaning of that article (11/11/1997, C-251/95, *Sabèl*, EU:C:1997:528, § 16, 18; 29/09/1998, C-39/97, *Canon*, EU:C:1998:442, § 30).
- 27 The global appreciation must be based on the overall impression given by the trade marks, bearing in mind, in particular, their distinctive and dominant components (11/11/1997, C-251/95, *Sabèl*, EU:C:1997:528, § 23; 22/06/1999, C-342/97, *Lloyd Schuhfabrik*, EU:C:1999:323, § 25).

Relevant public and territory

- 28 The perception of the marks in the relevant public's mind for the goods and services in question plays a decisive role in the global assessment of the likelihood of confusion.
- 29 The earlier right is a Swedish registration. Therefore, the relevant territory is that of Sweden.
- 30 The relevant public is made up of consumers who are likely to use both the goods and services of the earlier mark and the goods and services covered by the mark applied for (13/05/2015, T-169/14, *Koragel / CHORAGON*, EU:T:2015:280, § 25 and the case-law cited).
- 31 The Board observes that the relevant goods in Classes 9 and 11 target the public at large as well as professional and business customers with specific professional knowledge or expertise. The public's degree of attentiveness may vary from average to high, depending on the price, sophistication, or terms and conditions of the goods and services purchased.

Comparison of the goods

- 32 The goods applied for which are at issue in the present appeal are the following:

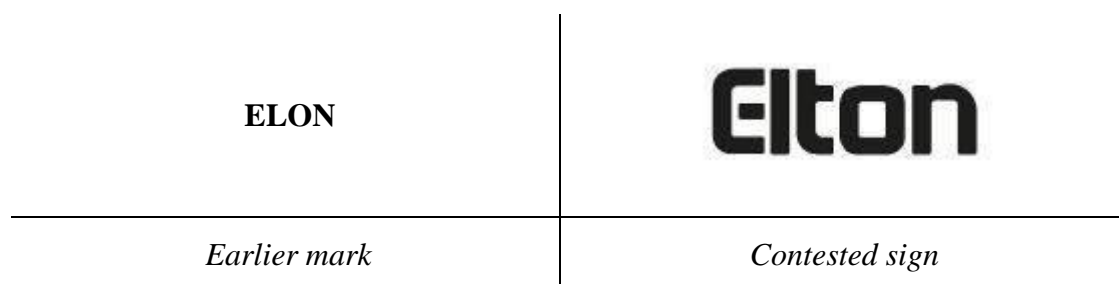
Class 9: Software for remote control and intelligent operation of heating apparatus for dispensing hot beverages and installations for heating beverages.

Class 11: *Heating apparatus for dispensing hot beverages; Installations for heating beverages; Coffee machines, electric; Coffee capsules, empty, for electric coffee machines.*

- 33 The goods on which the opposition is based are those listed above under paragraph 5 b).
- 34 The Opposition Division concluded that the contested goods at issue in the present appeal were either identical or similar to the opponent's goods.
- 35 The applicant merely refers to its previous submissions and states that there is only a limited similarity between the goods under comparison. The applicant essentially contends that, in contrast to the earlier goods, the contested goods focus on the high-end consumer market.
- 36 In the absence of convincing arguments to dispute the contested decision's findings, the Board may lawfully adopt the reasoning of the contested decision, which then becomes an integral part of the Board's own decision (13/09/2010, T-292/08, *Often*, EU:T:2010:399, § 48; 11/09/2014, T-450/11, *Galileo*, EU:T:2014:771, § 36; 06/02/2020, T-135/19, *LaTV3D / TV3*, EU:T:2020:36, § 19). The Board sees no obvious reason to reverse the contested decision's correct findings and hereby endorses the contested decision's reasoning and conclusion regarding the comparison of the goods at issue.
- 37 Therefore, the Board agrees with the Opposition Division that the contested goods at issue in the present appeal are either identical or similar to the opponent's goods.

Comparison of the marks

- 38 The global assessment of the likelihood of confusion must, insofar as it concerns the visual, aural or conceptual similarities between the signs at issue, be based on the overall impression given by the signs, bearing in mind, in particular, their distinctive and dominant elements. The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the global assessment of that likelihood of confusion. In this regard, the average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details (09/12/2020, T-621/19, *JC JEAN CALL Champagne GRANDE RESERVE bottle (3D) / Bottle (3D)*, EU:T:2020:595, § 26 and the case-law cited therein).
- 39 The signs to be compared are:



- 40 The relevant territory is Sweden.

- 41 The earlier mark consists of the word ‘ELON’. It is recalled that the protection which results from registration of a word mark concerns the word mentioned and not the specific graphic or stylistic elements accompanying that mark (13/02/2007, T-353/04, Curon, EU:T:2007:47, § 74; 18/11/2020, T-21/20, K7, EU:T:2020:550, § 40). Thus, for the protection of word marks, it is irrelevant whether they are written in upper- or lower-case letters (31/01/2013, T-66/11, Babilu, EU:T:2013:48, § 57).
- 42 The contested sign is composed of the word ‘Elton’, written in slightly stylised black bold letters.
- 43 The Board considers that the slight stylisation of the contested mark will be perceived as merely ornamental and it is not liable to attract the attention of the relevant public to any great extent. Thus, the verbal element ‘Elton’ is the most distinctive element of the earlier mark.
- 44 It is in light of the above findings that the signs at stake must be compared.
- 45 Visually, the signs are similar to the extent that they coincide in the sequence of letters ‘EL*ON, present in the same order in both terms.
- 46 The signs in question differ in the additional letter ‘T’ in the middle of the contested mark which has no counterpart in the earlier mark. However, as correctly observed in the contested decision, its intermediate position makes it visually less noticeable compared to the very similar beginnings and endings.
- 47 The signs also differ in the slight stylisation of the contested sign, which, however, will be perceived as merely ornamental and has a lower degree of impact on the overall visual impression than the verbal element. Therefore, it is not capable of introducing a visually significant difference between the signs in question.
- 48 Overall, the Board endorses the Opposition Division’s conclusions that the signs are visually highly similar.
- 49 Concerning the aural comparison, the Board observes that the applicant provided for the first time on appeal a ‘Linguistic report RWS’ (Annex 1). The Board further observes that the study's reliability is challenged by the opponent due to the lack of methodology, unclear origin, multilingual inconsistencies, and absence of evidence.
- 50 To assess the reliability of the results of such study, the applicant should have provided relevant information about the provider and the background of the language specialists which were consulted (a copy of the expert’s CV or the company profile; membership of professional associations, etc.). However, apart from asserting that RWS is ‘a global and prominent leader in translation services, language services and intellectual property support solutions’, the applicant merely submitted the URL address <https://www.rws.com/>.
- 51 In this regard, it is recalled that the onus of supplying evidence is on the parties and not on the Office. According to Article 95(1) EUTMR, in relative grounds proceedings, the Office is restricted to the examination of the facts, evidence and arguments submitted by the parties and the relief sought. The Office is not required to examine on its own motion the links indicated by the parties in order to retrieve the information mentioned

in their observations (05/09/2023, R 2232/2022 2, KENZO, § 72; 10/08/2023, R 125/2023 1, ParkOne, § 59; 03/05/2019, R 1997/2018 2, mestral (fig.) / Mistral, § 26).

- 52 With a limited number of exceptions (such as a hyperlink or URL address to the official database of one of the Member State's IPOs, the official databases maintained by EU institutions, and bodies or international organisations), hyperlinks or URL addresses, per se, cannot be considered sufficient evidence (05/09/2023, R 2232/2022 2, KENZO, § 72; 10/08/2023, R 125/2023 1, ParkOne, § 59; 01/03/2022, R 940/2021 2, BlefOX (fig.) / Blefa baby, § 33-34; 13/06/2022, R 1505/2021 2, MEGA SPLITS / SPLITZ et al., § 61). This is because the information accessible through a hyperlink or URL address might later be altered or removed. Moreover, it may be difficult to identify the relevant content (08/12/2021, T-294/20, Kaas keys as a service, EU:T:2021:867, § 23; 10/08/2023, R 125/2023 1, ParkOne, § 60).
- 53 The authenticity and integrity of the information cited with only a hyperlink to a website, or a URL address cannot, therefore, be verified (10/08/2023, R 125/2023 1, ParkOne, § 60). Consequently, the submission of links to websites cannot be considered valid pieces of evidence and cannot be taken into account (07/02/2007, T-317/05, Guitar, EU:T:2007:39, § 59).
- 54 Therefore, hyperlinks and URL addresses should be supplemented with additional evidence, such as a printout or screenshot of the relevant information contained therein. This approach is in line with the 'CP10 Common Communication – Criteria for assessing disclosure of designs on the internet' (Section 2.4.4, p.29) and 'CP12 Common Communication – Evidence in trade mark appeal proceedings: filing, structure and presentation of evidence, and the treatment of confidential evidence' (Section 3.1.2.8, p. 14). These were established by the IP offices of the European Union in the framework of the European Union Trade Mark and Design Network, in order to offer guidance on the sources, reliability and presentation of online evidence. Both common communications take into consideration established case-law of the European Courts and, therefore, reflect the current legal situation (10/08/2023, R 125/2023-1, ParkOne, § 64).
- 55 However, as the applicant did not submit any printed version of the information contained in the websites in question in relation to the author of the study submitted as Annex 1, the
- 56 Under the circumstance, the Board is not in a position to properly assess the reliability of the study presented as Annex 1. In any case, the results of such a linguistic study, even if taken into consideration, would not be decisive, for the reasons explained below.
- 57 Aurally, the Board considers that, from the perspective of the relevant Swedish-speaking public, the signs in question are aurally similar to at least an above-average degree for the following reasons.
- 58 Both names are two-syllable words with a similar syllable structure and follow a similar rhythmic pattern, with the first syllable stressed and the second syllable less stressed.

- 59 Both names start with ‘E’. Although the initial vowel in ‘ELON’ is elongated (/e:/), the vowel quality is similar to the short /ɛ/ in ‘ELTON’. Both are front vowels, creating a similar vowel sound at the beginning of both names.
- 60 The ‘L’ sound is consistent in both names, pronounced as a clear ‘l’. This ensures that the transition from the vowel sound is similar in both names.
- 61 The letter ‘O’, positioned in the penultimate position in both signs, contributes to a similar overall pronunciation. Although the ‘O’ in ‘ELON’ is pronounced as a long and rounded vowel (/o:/), whereas in ‘ELTON’, the ‘O’ is shorter and less emphasised.
- 62 Both names end with the consonant ‘N’, pronounced as a regular ‘n’. This provides a similar ending sound for both names.
- 63 These similarities ensure that, despite the differences in vowel length and the presence of the additional consonant ‘T’ in the middle of ‘ELTON’, the overall pronunciation of ‘ELTON’ and ‘ELON’ in Swedish sounds quite similar. Indeed, the difference in the middle letter ‘T’ should not be overestimated, as its intermediate position makes it aurally less noticeable compared to the very similar beginnings and endings.
- 64 Concerning the conceptual comparison, the Opposition Division considered that ‘as the signs will be associated with different personal names and, therefore, a dissimilar meaning, the signs are conceptually not similar’. However, the contested decision also pointed out that ‘having regard to most recent case-law, it is also true, however, that the comparison between the signs is not decisively influenced by the fact that they refer to different forenames, and the slight stylisation of the contested mark cannot have a significant impact on the conceptual comparison between the signs neither (19/09/2023, R 252/2023-5, ELTON (fig.) / ELON)’.
- 65 The applicant argues that the conceptual difference between the signs is clear essentially because the contested sign ‘ELON’ will evoke a direct association with worldwide famous Elon Musk, while the earlier mark ‘ELTON’ will be directly associated with the also world-famous British pop singer Elton John. Therefore, the applicant submits not only that the signs at issue are conceptually different, but also that that difference is such as to counteract the similarities of those signs in other respects.
- 66 Contrary to the applicant’s assertions, counteraction is subject, in accordance with the case-law, to much more specific criteria.
- 67 According to the case-law, in a situation where at least one of the signs at issue has, from the perspective of the relevant public, a clear and specific meaning which can be grasped immediately by that public, it can be concluded that those signs produce a different overall impression, despite the existence, between them, of certain elements of similarity visually or phonetically (see judgment of 4 March 2020, EUIPO v Equivalenza Manufactory, C328/18 P, EU:C:2020:156, paragraph 75 and the case-law cited).
- 68 However, in this instance, it cannot be argued that the marks in question have such a clear and specific meaning which can be grasped immediately by the relevant Swedish public.

- 69 As observed in the contested decision, which the applicant has not convincingly challenged, the Board maintains that at least a non-negligible portion of the relevant Swedish public will not immediately associate the mere forename ‘ELTON’ with the British pop singer Elton John, nor the forename ‘ELON’ with the businessman Elon Musk.
- 70 The applicant’s reliance on Wikipedia excerpts and other online documents to establish that Elton John and Elon Musk are famous is insufficient. These sources merely affirm the notoriety of these individuals but fail to provide concrete evidence that the Swedish public would commonly associate the mere forenames ‘ELTON’ or ‘ELON’ specifically with these personalities. The file lacks substantial evidence to support such recognition, also because the famous personalities mentioned are predominantly recognised by their full names.
- 71 Instead, it is likely that a non-negligible part of the Swedish public would perceive both signs as ordinary forenames or even as fanciful terms, particularly considering the nature of the goods in question, which include heating apparatus for dispensing hot beverages, installations for heating beverages, coffee machines, coffee capsules, and apparatus for cooking. These products do not naturally lend themselves to creating such an association.
- 72 Therefore, while part of the public may perceive such names as alluding to different famous persons, another part of the public would perceive them as simply forenames or even as a fanciful term.
- 73 In those circumstances, it must be concluded that the only conceptual difference between the signs is not such that the signs at issue produce a different overall impression.
- 74 In fact, it must be noted that the question of whether first names, in isolation, are concepts within the meaning of a conceptual comparison does not appear to be entirely resolved in case-law.
- 75 In a relatively recent judgment (30/06/2021, T-531/20, ROLF / WOLF, EU:T:2021:406, § 63, 64) the General Court stated that ‘the case-law is not entirely settled on how to carry out a conceptual comparison in the case of signs referring to surnames or first names of persons. According to one line of case-law, the fact that marks contain surnames or first names opens the possibility of a conceptual comparison but does not necessarily imply that there is a conceptual similarity, which can result only from an examination of each individual case. According to a second line of case-law, a conceptual comparison between trade marks composed of surnames or first names of persons is in principle impossible and neutral, unless there are special circumstances which make such a comparison possible, such as, for example, the celebrity of the person concerned or the semantic content of a name (see judgment of 16 December 2020, Production Christian Gallimard v EUIPO – Éditions Gallimard (PCG CALLIGRAM CHRISTIAN GALLIMARD), T-863/19, not published, under appeal, EU:T:2020:632, § 101-106 and the case-law cited)’.
- 76 The Board further notes that, in a more recent judgment (01/12/2021, T-467/20, ZARA / ZARA (fig.) et al., EU:T:2021:842, § 143), the General Court seems to have opted for the second line of case-law, by endorsing the Boards of Appeal’s view that the

conceptual comparison between the signs ‘ZARA’/’ZARA’, if they were perceived as female forenames, is either not possible or remains neutral, because a first name that does not convey a ‘general and abstract idea’ and is devoid of semantic content, lacks any ‘concept’ (08/05/2020, R 2040/2019 4, ZARA / ZARA (fig.) et al., § 101, 102).

- 77 Therefore, in line with the most recent case-law, the Board considers that, although the signs may be perceived as different forenames, the comparison between the signs is not decisively influenced by the fact that the signs at issue refer to different forenames. Similarly, due to its secondary role in the overall impression of the sign, the slight stylisation of the contested mark cannot have a significant impact on the conceptual comparison between the signs.

Distinctiveness of the earlier mark

- 78 Account should be taken of the inherent characteristics of the mark, including whether or not it contains an element that is descriptive of the goods and services for which it has been registered, and other criteria – in particular, how intensive, geographically widespread and long-standing the use of the mark has been (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 22-23).
- 79 In determining the degree of distinctive character of a trade mark, an overall assessment must be made of the greater or lesser capacity it has to identify the goods or services for which it has been registered as coming from a particular undertaking.
- 80 As such, the distinctive character of a trade mark can only be appraised, firstly, by reference to the goods or services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public.
- 81 The opponent did not claim that its earlier mark is particularly distinctive by virtue of intensive use or reputation. Therefore, the assessment of the distinctiveness of the earlier mark must be based on its distinctiveness per se.
- 82 There is no indication in the file that the sign ‘ELON’, even if intended as a forename, is descriptive or otherwise weakly distinctive in relation to the relevant goods. As a result, the earlier mark enjoys an average degree of inherent distinctiveness.

Overall assessment of the likelihood of confusion

- 83 The appreciation of likelihood of confusion on the part of the public depends on numerous elements and, in particular, on the recognition of the earlier mark on the market, the association that can be made with the registered mark, and the degree of similarity between the marks and between the goods or services identified. It must be appreciated globally, taking into account all factors relevant to the circumstances of the case (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 18; 11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22).
- 84 Such a global assessment of a likelihood of confusion implies some interdependence between the relevant factors, and in particular, the similarity between the trade marks and between the goods or services. Accordingly, a greater degree of similarity between the goods or services may be offset by a lower degree of similarity between the marks, and vice versa (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 20;

11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 24; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17). The more distinctive the earlier mark, the greater the risk of confusion, and marks with a highly distinctive character, either per se or because of the reputation they possess on the market, enjoy broader protection than marks with a less distinctive character (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 18).

- 85 Furthermore, consumers rarely have the opportunity to make a direct comparison between the different marks but must trust in their imperfect recollection of them (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23; 03/03/2004, T-355/02, Zirh, EU:T:2004:62, § 41; 18/04/2007, T-333/04 & T-334/04, House of Donuts / DONUTS et al., EU:T:2007:105, § 44).
- 86 Overall, considering the identity or similarity between the goods, the high degree of visual similarity, and the at least above-average degree of phonetic similarity between the signs in question, as well as the normal degree of inherent distinctiveness of the earlier mark, the Board concludes that the conceptual differences between the signs are insufficient to rule out the existence of a likelihood of confusion within the meaning of Article 8(1)(b) EUTMR in this case.
- 87 This is the case even taking into account the fact that part of the relevant public may display a high level of attentiveness, since even for that public, it only rarely has the chance to make a direct comparison between the different marks but must trust in its imperfect recollection of them (03/05/2023, T-7/22, Financery / financify, EU:T:2023:234, § 91; 23/03/2022, T-146/21, Deltatic / Delta, EU:T:2022:159, § 121; 28/05/2020, T-333/19, GN Genetic Nutrition Laboratories, EU:T:2020:232, § 59; 16/07/2014, T-324/13, Femivia, EU:T:2014:672, § 48).
- 88 Finally, regarding the applicant's argument about the impact of conceptual differences on the comparison of the signs and the likelihood of confusion, the Board recalls that for neutralisation to apply, the meaning of at least one of the signs must be clear, specific, and immediately perceptible to the entire relevant public. In this case, for the reasons outlined in paragraphs 59 to 70, while the words 'ELTON' and 'ELON' may be associated by part of the relevant Swedish public with the British pop singer Elton John and the businessman Elon Musk, respectively, this is not true for at least a non-negligible part of the relevant Swedish public. Although the signs in question correspond to the forenames of these personalities, there is no indication that the entire relevant public would associate these signs with those personalities or that these forenames have a clear semantic content in their perception. Consequently, the visual and phonetic similarities between the signs could not be neutralised by a marked conceptual difference for a non-negligible part of the relevant public, resulting in a likelihood of confusion.

Conclusion

- 89 As the earlier Swedish trade mark registration No 551 583 leads to the success of the opposition for all the contested goods at issue in the present appeal, there is no need to examine the other earlier right invoked by the opponent (16/09/2004, T-342/02, Moser Grupo Media, S.L., EU:T:2004:268).
- 90 In light of the above considerations, the Opposition Division's contested decision is confirmed, and the appeal dismissed.

Costs

- 91 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the applicant, as the losing party, must bear the opponent's costs of the appeal proceedings.
- 92 As to the appeal proceedings, these consist of the costs of professional representation of EUR 550.
- 93 As to the opposition proceedings, the Opposition Division ordered each party to bear its own costs. This decision remains unaffected.
- 94 The total for both proceedings is therefore EUR 550.

Order

On those grounds,

THE BOARD

hereby:

- 1 **Dismisses the appeal.**
- 2 **Orders the applicant to bear the costs incurred by the opponent in the appeal proceedings amounting to EUR 550.**

Signed

V. Melgar

Signed

S. Rizzo

According to Article 6 of
Commission Regulation
(EC) No 216/96

Signed

V. Melgar

On behalf of

A. Pohlmann

Registrar:

Signed

H. Dijkema

